Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

80-826

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

IN RE: GRAND JURY INVESTIGATION
(Subpoena to NINO V. TINARI),
Petitioner
UNITED STATES ATTORNEY,
Appellant Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Petition for Writ of Certiorari from the judgment Order of the United States Court of Appeals for the Third Circuit, No. 80-1290 Misc. Action No. 79-0785 from the United States District Court for the Eastern District of Pennsylvania)

NINO V. TINARI, ESQUIRE
1313 Race Street
Philadelphia, Pa. 19107
(215) 569-2551
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

I. DOES COMPLIANCE WITH A SUBPOENA DIRECTED TO NINO V. TINARI, ESQUIRE, CONCERNING FEE INFORMATION ABOUT HIS CLIENT VIOLATE THE ATTORNEY-CLIENT PRIVILEGE?

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

IN RE: GRAND JURY INVESTIGATION
(Subpoena to NINO V. TINARI),
Petitioner
UNITED STATES ATTORNEY,
Sppellant, Responsent

AFFIDAVIT OF SERVICE

I, Dawn M. Gross, being duly sworn according to law, depose and say that I am employed as a secretary by Nino V. Tinari, Esquire, whose office is located at 1313 Race Street, Philadelphia, Pennsylvania, 19107, and that on November 19, 1980, I did send Certified Mail, Return Receipt Requested, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Frank J. Marine, Esquire, Appellate Section, Criminal Division, Department of Justice, Washington, D.C. 20539 the Petition for Writ of Certiorari. This is a Petition from the Final Judgment Order of the United States Court of Appeals for the Third Circuit.

No. 80-1290 entered on September 15, 1980. A Petition for Rehearing was denied by the United States Court of Appeals for the Third Circuit on October 14, 1980.

DAWN M. GROSS

Sworn to and subscribed
before me this
day of , 1980.

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OPINIONS BELOW

The opinion of the Honorable Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania, Misc. No. 79-785, granting the Motion to Quash the Subpoena issued to NINO V. TINARI, ESQUIRE, which said opinion was filed on January 17, 1980 is attached hereto.

The opinion of the United States Court of Appeals for the Third Circuit, No. 80-1290, filed on September 15, 1980, reversing the Order of the District Court, is attached hereto.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Third Circuit, No. 80-1290, reversing the order of the United States District Court for the Eastern District of Pennsylvania quashing a subpoena issued to Petitioner. The opinion of the Third Circuit Court of Appeals was filed on September 15, 1980.

A Petition for Rehearing In Banc was filed and on October 14, 1980 the United States Court of Appeals for the Third Circuit, No. 80-1290, issued an order denying the Petition for Rehearing In Banc.

This court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Richard Coppola pled guilty to mail fraud and conspiracy after an arson investigation by the Federal Government. In exchange for his guilty plea and five years probation, Coppola cooperated with the Government and testified against the defendants in the case of United States v. Michael Morrone, et al, E.D. Pa. Indictment No. 79-71.

Thereafter, Coppola contacted the Petitioner, NINO V. TINARI, ESQUIRE, to file a Petition to Withdraw the Guilty Plea based on the allegations that the Government coerced Coppola into entering the Plea and forced him to testify against the other defendants.

At the hearing on the Petition to Withdraw the Guilty Plea the Government questions Coppola with respect to how he paid Tinari's $5,000.00 fee.

The Petition to Withdraw the Guilty Plea was denied and the presiding judge, The Honorable Joseph L. McGlynn, Jr., commented that Coppola committed perjury and urged the Government to conduct an investigation.

Thereafter, the Government issued a subpoena seeking information from Tinari about the payment of his fee by Coppola.

Tinari filed a Motion to Quash the subpoena and after a hearing and the filing of briefs, the Honorable Charles R. Weiner granted the Motion to Quash.

The Government filed an appeal to the United States Court of Appeals to the Third Circuit and on September 15, 1980, that Court issued an opinion and order reversing the order of the District Court.

A Petition for Rehearing In Banc
was filed and denied on October 14, 1980.

ARGUMENT

The general rule is that fee and retainer information is not generally protected from disclosure by the attorney-client privilege. United States v. Strahl, 590 F. 2d 10 (1st Cir. 1978), cert. denied, 440 U.S. 918 (1979); In Re Grand Jury Proceedings (Jones), 517 F. 2d 666 (5th Cir. 1975).

However, an exception to this rule has been carved out by various courts. The Court in In re Sewel, 411 F. 2d 195, 197 (3rd Cir. 1969) cert. denied 396 U.S. 905 (1969) stated:

> In the absence of unusual circumstances, the fact of a retainer, the identity of the client, the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship. (emphasis added).

In the case of In Re Grand Jury Proceedings (Jones), 517 F. 2d 666, 671 (5th Cir. 1975) the Court, after noting

the general rule, stated:

> Despite the general rule, we have clearly recognized, albeit in dicta, that an exception exists. "Under certain circumstances, an attorney must conceal even the identity of a client, not merely his communications, from inquiry." American Can Co. v Citrus Feed Co., 5 Cir. 1971, 436 F. 2d 1125,1128, citing Baird v. Koerner, 9 Cir. 1960, 279 F. 2d 623, 635.

The District Court adopted a balancing approach method to resolve the issue of whether the information sought is protected by the attorney-client privilege. The District Court took into consideration various factors in striking a balance between full disclosure and privileged communications. When the District Court considered the policy behind the attorney-client privilege and balanced that against the government's need for compliance in this case, the court determined that under the facts in question it was necessary to protect

the communications under the attorney-client privilege.

In the per curiam opinion filed on September 15, 1980, the United States Court of Appeals for the Third Circuit did not use the balancing approach adopted by the District Court. Instead, the Court simply states that since the disclosure of the fact of retention or of the details of a fee arrangement would not implicate the client (Coppola) in the very criminal activity for which he sought legal advice, the communication is not protected under the attorney-client privilege pursuant to United States v. Hodge and Zweig, 548 F. 2d 1347 (9th Cir. 1977) and Baird v Koerner, 279 F. 2d 623 (9th Cir. 1960).

The petitioner contends that since the policy considerations behind the attorney-client privilege are critical to the effective representation of clients, the

Court of Appeals should have used the balancing approach asserted by the District Court instead of the rigid standards asserted in its per curiam opinion. There seems to be a growing weakening of the attorney-client privilege and this Honorable Court should grant this Petition for a Writ of Certiorari in order to review this very important issue.

Respectfully submitted,

NINO V. TINARI

APPENDIX

Opinion of the United States District Court for the Eastern District of Pennsylvania

Opinion of the United States District Court of Appeals for the Third Circuit

Order of the United States Court of Appeals for the Third Circuit denying a Petition for Rehearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF NINO V. TINARI : MISC. 79-785
SUBPOENA TO TESTIFY BEFORE A :
GRAND JURY :

FILED JAN 17 1980

MEMORANDUM OPINION AND ORDER

WEINER, J. JANUARY 17, 1980

Petitioner, a practicing attorney in the Philadelphia area, has filed a motion to quash a subpoena which requires him to testify before a Grand Jury. The subpoena, prepared by a special attorney for the Philadelphia Strike Force, requires the petitioner to testify before the Grand Jury and to bring with him "all financial records for the period from September 1, 1979 to the present which reflect the payment by Richard Coppola or anyone on his behalf, of any fee for legal services including, but not limited to:

1. Cash receipts records;
2. Deposit tickets reflecting the deposit of any payments by or on behalf of Richard Coppola; and
3. All invoices to Richard Coppola, or anyone on his behalf, for legal services."[1]

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1. See Exhibit A to Government's Answer to Motion to Quash Subpoena.

ENTERED: 1/17/80

CLERK OF COURT

The petitioner resists the subpoena on the grounds that it is "oppressive and unreasonable", "not relevant and necessary", in "[violation of] the attorney-client privilege", and "is a deliberate attempt on the part of the Government to destroy the attorney client relationship between NINO V. TINARI and RICHARD COPPOLA." For the reasons to follow, we grant the motion to quash.

It is undisputed that an attorney-client relationship exists between petitioner and Richard Coppola. Our inquiry therefore must focus on whether the information sought by the Government stands outside the scope of information protected by the attorney-client privilege, and whether the formalities for issuing and enforcing a Grand Jury subpoena have been met.

In order to place the issues in proper perspective, we must recite the following background details. This Grand Jury investigation arises out of a hearing on a motion to withdraw a guilty plea filed by the petitioner on behalf of his client, Richard Coppola. The petitioner alleged that the Government coerced Coppola into entering a guilty plea and also forced him to falsely testify against the defendants in the case of United States v. Michael Morrone, et al, Indictment No. 79-71.

At the hearing on the petition, Coppola testified that he did not receive anything of value to allege coercion. On cross-examination, the Government unsuccessfully sought to determine how Coppola was able to pay Mr. Tinari's legal fee of $5,000.00 for representation on the petition.

The petition to withdraw the guilty plea was denied, from the bench, with Judge McGlynn commenting that Coppola committed perjury at the hearing and urging the Government to investigate the possibility that someone suborned Coppola's perjury and obstructed justice.

With regard to any question concerning whether Coppola committed perjury, it is clear that the records sought will be merely cummulative. There is no question that at some point, Coppola's testimony was untruthful.

Judge McGlynn found Coppola to be untruthful at the hearing on his petition, concluding that Coppola was subject to some outside forces between the time he testified in the Morrone case and the time of the hearing.

Having concluded that the information sought in the subpoena will be merely cummulative with regard to the question of whether Coppola committed perjury, we now must determine whether the information is necessary

and relevant to the Jury's investigation into other alleged illegal activities.

Attached to the Government's answer to the motion to quash is a Schofield affidavit which purportedly establishes the relevance and need for the testimony and records. See, In Re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3rd Cir. 1973). The affidavit states that the Grand Jury is investigating various alleged illegal activities, specifically, possible violations of obstruction of justice, subornation of perjury, perjury, RICO (Racketeer Influenced and Corrupt Organizations) and conspiracy statutes.

The area of law into which this case reaches is extremely sensitive. On the one hand, we must be mindful of the Government's desire and responsibility to bring to justice those who violate the law. But equally important is our obligation to protect an individual's constitutional right to effective assistance of counsel and the attorney-client privilege.

Moreover, we are concerned that enforcement of this subpoena may inhibit an attorney's willingness to accept new clients, and consequently, may damage the cornerstone of the practice of law in this country.

We of course refer to the adversary nature of the proceedings.

Furthermore, enforcement presents the far reaching problem of how do we resolve the conflict created in the situation where government officials, after staking out an attorney's office, subpoenaes the attorney to provide a list of clients along with the fee arrangements. Regardless of whether the sought after information is relevant to a Grand Jury's investigation and/or privileged, the practical result is the possible destruction of the attorney's reputation, practice, and client's confidence.

In this case, the Government clearly has sufficient leads to follow in determining whether Coppola was connected with the alleged illegal activities being investigated. On balance, compelled disclosure of the seemingly innocent information sought, presents a too shocking departure from the approved constitutional methods for ferreting out alleged illegal activities. Moreover, our conclusion is not without legal precedent. In the case of Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), the court enunciated an exception to the general rule that disclosure of the identity of an attorney's clients and the nature of his fee arrangements with his clients are not confidential communications protected by

the attorney-client privilege. In substance, the exception is based upon the policy behind the privilege. The policy referred to is the promotion of freedom of consultation with legal advisors by the client, by the eliminating of apprehension caused by compelled disclosure. See, United States v. Hodge and Zweig, 548 F.2d 1347 (9th Cir. 1977; 8 J. Wigmore, Evidence §2291 (McNaughton rev. 1961). Consistent with this policy, we conclude that the subpoena must be quashed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF NINO V. TINARI SUBPOENA TO TESTIFY BEFORE A GRAND JURY	:	MISC. 79-785

ORDER

The motion to quash the subpoena issued to Nino V. Tinari is GRANTED.

IT IS SO ORDERED.

CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1290

IN RE: GRAND JURY INVESTIGATION
(SUBPOENA TO NINO V. TINARI)

UNITED STATES ATTORNEY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Misc. No. 79-0785)

Argued July 7, 1980
Before: WEIS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges
(Filed September 15, 1980)

Peter F. Vaira
United States Attorney
Frank J. Marine, Esq. (Argued)
Department of Justice
Washington, D.C. 20530
Ronald G. Cole
Special Attorney
Philadelphia Strike Force
Department of Justice
Attorneys for Appellant

Vincent P. DiFabio, Esq. (Argued)
1313 Race Street
Philadelphia, PA 19107
Attorney for Appellee

OPINION OF THE COURT

PER CURIAM:

A federal grand jury investigating perjury and obstruction of justice subpoenaed Nino V. Tinari, a practicing attorney in Philadelphia, and ordered him to produce his financial records reflecting payments made to him for legal services rendered his client, Richard Coppola. The district court granted Tinari's motion to quash the subpoena, holding that to compel the production of these records would impair the attorney-client relationship.

A year before this grand jury began its investigation, Coppola had pleaded guilty to criminal charges and agreed to cooperate with the government. He later testified for the prosecution in a trial that resulted in the conviction of four defendants on arson related charges. After those convictions were obtained, Tinari was retained by Coppola to file a motion to withdraw the guilty plea, alleging that the government had coerced it and forced him to testify falsely at the trial.

At a hearing on the motion, Coppola stated that he had not received anything of value in return for recanting the testimony he had given at the trial. He also said that he had paid Tinari $5,000 for his representation and still owed an additional $5,000. According to Coppola's testimony, he borrowed $5,000 in cash from his brother and sister to make the first payment to Tinari. The district judge denied the motion stating that he believed Coppola had been "reached" and that the Justice Department should consider a prosecution for perjury.

The matter was referred to a grand jury to determine whether Coppola had perjured himself in asserting that he had borrowed the $5,000 from his brother and sister, and whether others were implicated in subornation of perjury and obstruction of justice. It was in the course of this investigation that Tinari was ordered to produce his records for the grand jury.

After the motion to quash Tinari's subpoena was granted, Coppola, represented by a different lawyer, pleaded guilty to conspiracy to obstruct justice. He admitted receiving $10,000 from a relative of one of the arson defendants, paying $5,000 to Tinari and retaining $5,000 as part payment for recantation of his trial testimony. Coppola was sentenced for his offense but the grand jury has not completed its investigation of others who might be inculpated.

Tinari contends that the information sought is within the attorney-client privilege but that in any event the evidence is cumulative and, therefore, the district judge properly quashed the subpoena. The government argues that the fee arrangement between lawyer and client is not privileged and, alternatively, that Coppola waived any rights he might have had by testifying about the fee on several occasions.

The first matter to be considered is whether the case has become moot because of Coppola's plea of guilty to the obstruction of justice charge. Because the grand jury is still investigating participation of others along with Coppola in the conspiracy, the matter is not completed. The attorney's records may be helpful to the continuing investigation and, therefore, the case is not moot. *See In re Grand Jury (Johanson)*, —— F.2d ——, Nos. 80-1419, 1456 (3d Cir. Aug. 21, 1980).

We turn then to the merits. The attorney-client privilege extends to confidential disclosures made by a client to an attorney in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The privilege does not apply to every communication between client and attorney. It does not, for example, protect a disclosure of plans for future illegal activity. *Clark v. United States*, 289 U.S. 1, 15 (1933); *In re Grand Jury (FMC Corp.)*, 604 F. 2d 798, 802 (3d Cir. 1979); *United States v. Weinberg*, 226 F. 2d 161, 172 (3d Cir. 1955), *cert. denied*, 350 U.S. 933 (1956). Moreover, in the absence of unusual circumstances, the privilege

does not shield the fact of retention, the identity of clients, and fee arrangements. *In re Semel*, 411 F.2d 195, 197 (3d Cir.), *cert. denied*, 396 U.S. 905 (1969); *accord*, *In re Walsh*, —— F.2d ——, No. 79-2340, slip op. at 8 (7th Cir. May 19, 1980); *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975). Such information might be protected, however, if the person asserting the privilege can show a strong probability that disclosure of the fact of retention or of the details of a fee arrangement would implicate the client in the very criminal activity for which legal advice was sought. *United States v. Hodge and Zweig, supra* at 1353; *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960). That circumstance does not exist here.

The fact of an attorney-client relationship between Tinari and Coppola has been freely admitted and no contention has been made that disclosure of the fee arrangement would further implicate Coppola in the matter for which he consulted Tinari. Furthermore, it has never been suggested that individuals who may have made payments on Coppola's behalf were clients of Tinari. Therefore, disclosure of the names of any third parties would not disrupt any other attorney-client relationship. *Cf. In re Grand Jury (Jones)*, 517 F.2d 666 (5th Cir. 1975) (privilege claimed on behalf of unidentified clients who may have made payments for known clients).

There are no unusual circumstances to exempt this case from the general rule that fee information does not come within the attorney-client privilege. Therefore, it will not prevent the grand jury from scrutinizing this fee arrangement. Because of our disposition of this issue, we need not decide whether Coppola waived the privilege.[1] The district court's conclusion that the evidence is merely cumulative does not find support in the record and

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1. A client may waive the privilege by testifying as to part of a privileged communication. 8 J. WIGMORE, EVIDENCE §2329, at 638 (McNaughton rev. 1961).

does not constitute a basis for quashing the subpoena.

Accordingly the order of the district court quashing the subpoena will be reversed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 80-1290

IN RE: GRAND JURY INVESTIGATION
(SUBPOENA TO NINO V. TINARI)
UNITED STATES ATTORNEY,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, Circuit Judges.

The petition for rehearing filed by

Appellee

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: October 14, 1980

Judge